78-1179

Supreme Court, U. S.
FILED
JAN 29 1979
MICHAEL RODAK, JR., CLERK

In The
Supreme Court Of The United States

October Term, 1978

No.

William Grant, Jr., Joseph Guerriero, Ralph Irace
Petitioners,

v.

United States of America,
Respondent.

APPENDIX TO

JOINT PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

Of Counsel
M. DONALD CARDWELL
Lead Counsel
108 Oak Street
Hartford, Connecticut 06106

Appendix A

(1) Memorandum Opinion Below of United States Court of Appeals for the Second Circuit, dated July 21, 1978

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Twenty-first day of July one thousand nine hundred and seventy-eight.

P R E S E N T: HON. THOMAS J. MESKILL,
U.S. Circuit Judge
HON. EDWARD DUMBAULD,
*U.S. District Judge**
HON. EDMUND PORT,
U.S. District Judge

UNITED STATES OF AMERICA,
Appellee,

v.

WILLIAM F. GRANT, JR., *et al.*
Defendants-Appellants.

78-1046
78-1100
78-1101

Appeals from judgments entered in the United States District Court for the District of Connecticut, T. Emmet Clarie, *Judge,* convicting appellants of violations of federal gambling laws, 18 U.S.C. § 1955. Appellant Guerriero and Irace were also convicted of conspiring to conduct an illegal gambling business in violation of 18 U.S.C. § 3M. Each defendant was sentenced to two years in prison, suspended after 90 days, and a $5,000 fine.

Appendix A
(1) Memorandum Opinion Below of United States Court of Appeals for the Second Circuit, dated July 21, 1978

Appellants contend that the court erred in the admission of a transcript of the various taped conversations. A proper foundation as to the accuracy of the transcripts having been laid before the tapes were heard by the jury, the admission was proper. They further urge that permitting the jury to have possession of the transcripts during their deliberations constituted prejudicial error. This position is not sustainable in view of the limiting instructions that accompanied the delivery of the transcripts to the jury. They were plainly instructed that the transcript was to be used as a means of identifying any particular tapes that they might desire to hear in the jury room. This instruction carried the further caveat that the transcripts did not constitute any evidence but was merely a convenient tool for their use. *United States* v. *Nathan,* 536 F.2d 988 (2d Cir. 1976), *but see Steele* v. *United States* 222 F.2d 628 (5th Cir. 1955).

Appellants' claim of insufficiency of evidence is without merit.

We find no merit in appellants' other claims.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

Hon. Thomas J. Meskill, U.S.C.J.
Circuit Judge

Hon. Edward Dumbauld, U.S.D.J.

Hon. Edmund Port, U.S.D.J.
District Judges

Appendix A
(2) Ruling on Reconsideration En Banc

UNITED STATES COURT OF APPEALS
Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the thirtieth day of November, one thousand nine hundred and seventy-eight.

P R E S E N T: HON. THOMAS J. MESKILL,
Circuit Judge
HON. EDMUND PORT
HON. EDWARD DUMBAULD,
District Judges

United States of America,
Plaintiff-Appellee,

v.

Anthony D. Volpe, Michael T. O'Brien, Lawrence DiBenedetto, John T. Della Ferra, Charles Boornazian, Eugene Poulin, John Castagna, William Jacomini, Richard Bovino, Michael Chiarizio, Robert E. Morris, Frank Cecchini, George Speziale, Andrew Mascola, Ralph Irace, John Lepito, Joseph Guerriero, John Sullivan, Francis J. Campanelle, William Grant, Jr.,
Defendants,

William F. Grant, Jr., Ralph Irace, Joseph Guerriero,
Defendants-Appellants.

78-1046
78-1100
78-1101

A petition for a rehearing having been filed herein by counsel for the defendants-appellants, William Fr. Grant, Jr., Ralph Irace and Joseph Guerriero,

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

A. Daniel Fusaro
Clerk

Appendix A
(2) Ruling on Reconsideration En Banc

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the thirtieth day of November, one thousand nine hundred and seventy-eight.

United States of America,
Plaintiff-Appellee,

v.

Anthony D. Volpe, Michael T. O'Brien, Lawrence Dibenedetto, John T. Della Ferra, Charles Boornazian, Eugene Poulin, John Castagna, William Jacomini, Richard Bovino, Michael Chiarizio, Robert E. Morris, Frank Cecchini, George Speziale, Andrew Mascola, Ralph Irace, John Lepito, Joseph Guerriero, John Sullivan, Francis J. Campanelle, William Grant, Jr.,
Defendants,

William F. Grant, Jr., Ralph Irace, Joseph Guerriero,
Defendants-Appellants.

78-1046
78-1100
78-1101

A petition for rehearing containing a suggestion that the action be reheard in banc having filed herein by counsel for the defendants-appellants, William F. Grant, Jr., Ralph Irace, Joseph Guerriero, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

IRVING R. KAUFMAN,
Chief Judge

Appendix A
(4) Memorandum Opinion Below of United States Court of Appeals for the Second Circuit, dated June 13, 1978

UNITED STATES COURT OF APPEALS
For The
Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirteenth day of June, one thousand nine hundred and seventy-eight.

P R E S E N T: HON. LEONARD P. MOORE,
HON. WILLIAM H. MULLIGAN,
HON. MURRAY I. GURFEIN,
Circuit Judges,

Docket Nos. 77-1313, 77-1317, 77-1344, 77-1347, 77-1350, 77-1355, 77-1367, 78-1033, 78-1082, 78-1083, 78-1084, 78-1085, 78-1090

UNITED STATES OF AMERICA,
Appellee,

against

ANTHONY VOLPE, ET AL.,
Appellants.

Appellants appeal from judgments of conviction entered in the United States District Court for the District of Connecticut. The primary contention on appeal is that for various reasons which had been raised below, evidence developed as a result of a court-approved wiretap and "bug" should have been suppressed. For the reasons ably and fully stated in Chief Judge Clarie's opinion in Crim. No. H-76-37, et. al, March 15, 1977 we affirm the district court's denial of the suppression motions. Appellants DiBenedetto and Volpe's arguments with respect to severance are unper-

suasive. The district court has broad discretion in this area, *United States* v. *Jenkins*, 496 F.2d 57 (2d Cir. 1974) and the standards of *United States* v. *Finkelstein*, 526 F.2d 517 (2d Cir. 1975), have not been met. We have considered the other points raised and find them meritless. The convictions are affirmed.

/s/ LEONARD P. MOORE
LEONARD P. MOORE

/s/ WILLIAM H. MULLIGAN
WILLIAM H. MULLIGAN

/s/ MURRAY I. GURFEIN
MURRAY I. GURFEIN

Appendix A
(5) Ruling on Reconsideration and En Banc

UNITED STATES COURT OF APPEALS
Second Circuit

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the seventh day of August, one thousand nine hundred and seventy-eight.

77-1313

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ANTHONY D. VOLPE, et al.,
Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellants, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ IRVING R. KAUFMAN
Chief Judge
IRVING R. KAUFMAN

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the seventh day of August, one thousand nine hundred and seventy-eight.

Appendix A
(5) Ruling on Reconsideration and En Banc

UNITED STATES COURT OF APPEALS
Second Circuit

P R E S E N T: HONORABLE WILLIAM H. MULLIGAN,
HONORABLE MURRAY I. GURFEIN,
HONORABLE LEONARD P. MOORE, *Circuit Judges.*

77-1313

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ANTHONY D. VOLPE, et al.,
Defendants-Appellants.

A petition for a rehearing having been filed herein by counsel for the appellants

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

A. DANIEL FUSARO,
Clerk

Appendix A
(6) Order Extending Time To File Petition For Writ of Certiorari

SUPREME COURT of the UNITED STATES

No. A-568

William F. Grant, Jr., Ralph Irace and Joseph Guerriero,
Petitioners

v.

United States

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 29, 1979.

/s/ Thurgood Marshall
Associate Justice of the Supreme
Court of the United States

Dated this 20th
day of December, 1978.

APPENDIX B

Statutes Involved

§ 2510. Definitions

As used in this chapter—

(1) "wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications;

(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation;

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

(4) "intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.

(5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire or oral communication other than—

(a) any telephone or telegraph instrument, equiment or facility, or any component thereof,

(i) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or (ii) being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

(b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal;

(6) "person" means any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation;

(7) "Investigative or law enforcement officer" means any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the presecution of such offenses;

(8) "contents," when used with respect ot any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication;

(9) "Judge of competent jurisdiction" means —

(a) a judge of a United States district court or a United States court of appeals; and

(b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire or oral communications;

(10) "communication common carrier" shall have the same meaning which is given the term "common carrier" by section 153(h) of title 47 of the United States Code; and

(11) "aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 212.

§ 2511. Interception and disclosure of wire or oral communications prohibited

(1) Except as otherwise specifically provided in this chapter any person who—

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

(b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) willfully discloses, or endeavors to disclose,

to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(2) (a) (i) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication: *Provided,* That said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(ii) It shall not be unlawful under this chapter for an officer, employee, or agent or any communication common carrier to provide information, facilities, or technical assistance to an investigative or law enforcement officer who, pursuant to this chapter, is authorized to intercept a wire or oral communication.

(b) It shall not be unlawful under this chapter for an officer, employee, or agent of the Federal Communications

Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.

(3) Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or exis-

tence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 213, and amended Pub.L. 91-358, Title II, § 211(a), July 29, 1970, 84 Stat. 654.

§ 2516. Authorization for interception of wire or oral communications

(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of—

(a) any offense punishable by death or by imprisonment for more than one year under sections 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), or chapter 102 (relating to riots);

(b) a violation of section 186 or section 501(c) of

title 29, United States Code (dealing with restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), subsection (d), (e), (f), (g), (h), or (i) of section 844 (unlawful use of explosives), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1511 (obstruction of State of local law enforcement), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 1955 (prohibition of business enterprises of gambling), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), sections 2314 and 2315 (interstate transportation of stolen property), section 1963 (violations with respect to racketeer influenced and corrupt organizations) or section 351 (violations with respect to congressional assassination, kidnapping and assault);

(d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;

(e) any offense involving bankruptcy fraud or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title; or

(g) Any conspiracy to commit any of the foregoing offenses.

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 216, and amended Pub.L. 91-452, Title VIII, § 810, Title IX, § 902(a), Title XI, § 1103, Oct. 15, 1970, 84 Stat. 940, 947, 959;

Pub.L. 91-644, Title IV, § 16, Jan. 2, 1971, 84 Stat. 1891.

§ 2518. Procedure for interception of wire or oral communications

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the

nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically

terminate when the described communication has been first obtained.

An order authorizing the interception of a wire or oral communication shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobstrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant at the prevailing rates.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be

made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—

(a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be

served as provided for in subsection (d) of this section on the person named in the application.

(8) (a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such a way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of ap-

proval under section 2518 (7) (b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party

will not be prejudiced by the delay in receiving such information.

(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization, or approval.

Such motion shall be made before trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of ap-

proval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 218 and amended Pub.L. 91-358, Title II, § 211(b), July 29, 1970, 84 Stat. 654.

§ 1955. Prohibition of illegal gambling business

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and con-

ducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of $2,000 in any single day shall be deemed to have been established.

(d) Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States. All provisions of law relating to the seizure, summary, and judicial forfeiture procedures, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from such sale; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred or alleged to have been incurred under the provisions of this section, insofar as applicable and not inconsistent with such provisions. Such duties as are imposed upon the collector of customs or any other person in respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of property used or intended for use in violation of this section by such officers, agents, or other persons as may be designated for that purpose by the Attorney General.

(e) This section shall not apply to any bingo game, lottery, or similar game of chance conducted by an organization exempt from tax under paragraph (3) of subsection (c) of section 501 of the Internal Revenue Code of 1954, as amended, if no part of the gross receipts derived from such activity inures to the benefit of any private shareholder, member, or employee of such organization except as compensation for actual expenses incurred by him in the conduct of such activity.

(4) *United States v. Scafidi, 564 F.2d 633 (2d Cir. 1977), cert. denied sub nom. Vigorito v. United States, Napoli v. United States, and De Luca v. United States, 23 Cr. L. 4057 (May 17, 1978)*

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Nos. 909 to 917, Docket 76-1495.

UNITED STATES OF AMERICA,

Appellee,

— v. —

EUGENE SCAFIDI, BARIO MASCITTI, ANTHONY DIMATTEO, SAVERIO CARRARA, MICHAEL DELUCA, JAMES NAPOLI, JR., JAMES V. NAPOLI, SR., ROBERT VOULO AND SABATO VIGORITO,

Appellants.

Argued May 16, 1977.

Decided Oct. 12, 1977.

Defendants were convicted in the United States District Court for the Eastern District of New York, Jacob Mishler, Chief Judge, of conducting illegal gambling businesses, and they appealed. The Court of Appeals, Moore, Circuit Judge, held that: (1) the most reasonable interpretation of the or-

ders granting authority to bug private premises was that the orders implied approval for secret entry to place, repair and/or remove bugs implanted on premises; (2) entries for secret placement, repair and/or removal of bugs were, therefore, valid as they adhered to authorized single purpose of seizing conversations represented in papers on which original orders were granted; (3) affidavits underlying eavesdropping orders were not insufficient on grounds alleged by defendants; (4) evidence including that which was obtained from properly authorized eavesdropping devices, was sufficient to sustain convictions; (5) indictment was not fatally defective for failure to specify type of gambling business particular defendant was alleged to have conducted, and (6) severance of remaining substantive counts upon dismissal of conspiracy count was not required in absence of evidence that prejudice would have otherwise resulted or that conspiracy count had not been alleged in good faith.

Affirmed.

Gurfein, Circuit Judge, concurred and filed opinion.

J. Joseph Smith, Circuit Judge, dissented and filed opinion.

1. Telecommunications—493

Statute which confers standing upon "aggrieved persons" to object to unauthorized electronic surveillance does not expressly encompass standing to object to allegedly unauthorized entries to place or recharge bugging devices. 18 U.S.C.A. § 2510(11).

2. Telecommunications—493

Only one present at the seizure or with a recognized interest, either possessory or proprietary, in the premises can claim the required expectation of privacy needed to object to an alleged illegal entry. 18 U.S.C.A. § 2510(11).

3. Telecommunications—493

Any issue of unauthorized entry could be raised by defendant who was manager of lounge where allegedly improper surreptitious entries were made by agents to place and recharge bugging devices. 18 U.S.C.A. § 2510(11).

4. Telecommunications—493

An arguable claim to a proprietary interest in apartment where allegedly improper surreptitious entries were made by agents to place and recharge bugging devices was in defendant who was given key to apartment by true lessee so that he could enter on his own. 18 U.S.C.A. § 2510(11).

5. Criminal Law—394.5 (2)

Whatever the exact, technical interests, or lack thereof, which the defendants had in the premises which were alleged to have been illegally entered by agents to place and recharge bugging devices, it seemed artificial to say that a person overheard, whose conversation would not have been overheard but for entry, had no standing to move to suppress conversations on a claim that entry was improper. 18 U.S.C.A. § 2510(11).

6. Telecommunications—493

Whether standing was accorded to only one or any number of defendants to object to allegedly improper surreptitious entries made by agents to place and recharge bugging devices, where court orders authorizing use of bugs and agents' activities were entirely proper under circumstances, it was unnecessary to determine whether standing existed for defendants to raise claim of alleged illegal entries. 18 U.S.C.A. § 2510(11).

7. Telecommunications—496

Though the Omnibus Crime Control Bill of 1968 prohibits all surreptitious police entries to install, repair or remove court-authorized bugs, it is clear from the legislative history of the Bill as well as the language of the statute, that Congress intended to empower courts to permit such entries in proper cases and under proper procedures. 18 U.S.C.A. § 2510 *et seq.*

8. Telecommunications—496

The most reasonable interpretation of the orders granting authorization to bug private premises was that the orders implied approval for secret entry to place, repair and/or remove bugs implanted on premises. 18 U.S.C.A. § 2510 *et seq.*

9. Telecommunications—496

An order approving electronic surveillance of conversations to be overheard at a particular private place must, to be effective, carry its own authority to make such reasonable entry as may be necessary to effect "seizure" of conversations. 18 U.S.C.A. § 2510 *et seq.*

10. Telecommunications—496

Once a judicial officer is convinced by the facts presented to him that electronic surveillance will aid in the

detection of crime, his authorization that it be used should then transfer to the appropriate police agency the decision as to the precise mechanical means whereby the order is to be carried out. 18 U.S.C.A. § 2510 *et seq.*

11. Telecommunications—496

If the instrumentality by which an electronic surveillance is to be carried out is a "bug," the placing of such a bug must of necessity be in the hands of the person so authorized; and such placement would have to be surreptitious, for no self-respecting police officer would openly seek permission from the person to be surveilled to install a "bug" to intercept his conversations. 18 U.S.C.A. § 2510 *et seq.*

12. Telecommunications—496

While it would be highly naive to impute to a district judge a belief that the device required to effect his bugging authorization did not require installation, neither should judges be presumed to have such familiarity with the installation of such devices or the premises in which they are to be installed, and the court should be required in its order to specify the methods of entry, the appropriate location of the bug, and the steps to insure its proper functioning. 18 U.S.C.A. § 2510 *et seq.*

13. Telecommunications—496

That the wiretapping statute requires general supervision by the courts over the bugging operation does not even impliedly impose on the courts the practical enforcement steps. 18 U.S.C.A. § 2510 *et seq.*

14. Telecommunications—496

When an order has been made upon adequate proof as to probable cause for the installation of a device in particular premises, a separate order authorizing entry for installation purposes is not required. 18 U.S.C.A. § 2510 *et seq.*

15. Telecommunications—496

Subsequent entries for repair or battery recharging do not alter rule that when an order has been made upon adequate proof as to probable cause for installation of a device in particular premises, no separate order authorizing entry for installation purposes is required. 18 U.S.C.A. § 2510 *et seq.*

16. Telecommunications—496

Entries for secret placement, repair and/or removal of bugs were not invalid as long as they adhered to authorized single purpose of seizing conversations represented in papers on which original orders were granted. 18 U.S.C.A. § 2510 *et seq.*

17. Telecommunications—496

Affidavits underlying order authorizing electronic surveillance sufficiently demonstrated need to bug particular apartment where physical surveillance had detailed regular goings and comings of defendants and analysis of apartment's trash had revealed betting slips and records. 18 U.S.C.A. § 2510 *et seq.*

18. Telecommunications—496

Order authorizing electronic surveillance of lounge was

not invalid for insufficiency of underlying affidavit where affidavit presented information received from confidential informants with established records of credibility; in addition, physical surveillance identified comings and goings of principal suspects. 18 U.S.C.A. § 2510 *et seq.*

19. Telecommunications—496

Affidavit underlying order authorizing electronic surveillance of apartment was not insufficient for failure to demonstrate what other investigative procedures had been tried without success as long as it adequately informed judge of nature and progress of investigation and on difficulties inherent in use of normal law enforcement methods. 18 U.S.C.A. § 2510 *et seq.*

20. Telecommunications—496

Where a single eavesdropping order is extended, tapes do not have to be sealed until end of last extension. 18 U.S.C.A. § 2510 *et seq.*

21. Telecommunications—496

Where intercept is on same premises and involves substantially same persons, an extension under those circumstances requires sealing only at conclusion of whole surveillance. 18 U.S.C.A. § 2510 *et seq.*

22. Criminal Law—444

Once eavesdropping orders were deemed extensions of prior ones, administrative delay in sealing, in only one instance more than seven days, was reasonable and fully understandable, but even if later orders were deemed separate events, delays in sealing tapes of conversations after expira-

tion of authorizing orders did not require suppression in view of satisfactory explanation presented by Government for delays. 18 U.S.C.A. § 2518(8)(a).

23. Criminal Law—394.3

That eavesdropping devices placed on subject premises continued beyond their 15-day expiration dates was not such as to require suppression of tapes obtained as a result thereof where authorizations for devices expressly excluded counting Sundays, so that all of the overheard conversations were within the authorized time periods. 18 U.S.C.A. § 2518(8)(a).

24. Telecommunications—496

Requirement of reports, designed to enable district judge to evaluate continuing need for surveillance, is in first instance discretionary with judge authorizing eavesdropping devices; rule is also applicable with respect to sanctions for failure to file timely. 18 U.S.C.A. § 2518 (8)(a).

25. Criminal Law—394.3

Authorizing judges did not under circumstances abuse their discretion in failing to suppress tapes obtained from eavesdropping devices for failure of Government to timely file progress reports. 18 U.S.C.A. § 2518(8)(a).

26. Criminal Law—394.3

Failure of Government to name particular defendant in eavesdropping order did not in itself require suppression of defendant's conversations gathered from that order. 18 U.S.C.A. § 2518(8)(a).

27. Criminal Law—394.3

Misidentification of particular defendant in eavesdropping order did not require suppression of defendant's conversations gathered from that order in absence of evidence that Government was not acting in good faith. 18 U.S.C.A. § 2518(8)(a).

28. Gaming—98(1)

Evidence, including that which was obtained from properly authorized eavesdropping devices, was sufficient to sustain convictions of defendants of operating illegal gambling businesses. 18 U.S.C.A. § 1955.

29. Gaming—85(1)

Indictment which tracked language of statute governing offense of operating an illegal gambling business and specified approximate dates and relevant New York Statutes was not clearly defective for failure to specify type of gambling business defendant was alleged to have conducted. 18 U.S.C.A. § 1955.

30. Criminal Law—618

Severance of remaining substantive counts upon dismissal of conspiracy count in prosecution charging operation of illegal gambling businesses was not required in absence of evidence that prejudice would otherwise have resulted or that conspiracy count had not been alleged in good faith. 18 U.S.C.A. § 1955.

Michael E. Moore, Atty., Dept. of Justice, Washington, D.C. (Fred F. Barlow, Sp. Atty., Dept of Justice, Brooklyn, N. Y., and David G. Trager, U. S. Atty. for the Eastern District of New York, Brooklyn, N. Y., William G. Otis, Atty., Dept. of Justice, Washington, D.C., of counsel), for appellee.

Arnold E. Wallach, New York City, for appellant Scafidi.

David J. Gottlieb, New York City (The Legal Aid Society, Federal Defender Services Unit, New York City, William J. Gallagher, New York City, of counsel), for appellant Mascitti.

Richard W. Hannah, Brooklyn, N. Y., for appellant DiMatteo.

Salvatore Piazza, Brooklyn, N. Y., for appellant Carrara.

Max Wild, New York City, for appellants DeLuca and Napoli, Sr.

Thomas J. O'Brien, New York City, for appellant Napoli, Jr.

Dominick L. DiCarlo, Brooklyn, N. Y. (Donald E. Nawi, New York City, of counsel), for appellant Voulo.

Gustave H. Newman, New York City, for appellant Vigorito.

Albert J. Brackley, Brooklyn, N. Y., on the brief, for appellant DeLuca.

Rubin, Baum, Levin, Constant & Friedman, New York City, of counsel, for appellant Napoli, Sr.

Before MOORE, SMITH and GURFEIN, Circuit Judges.

MOORE, Circuit Judge:

Nine defendants, Eugene Scafidi, Robert Voulo, James Napoli, Sr., James Napoli, Jr., Michael DeLuca, Sabato Vigorito, Saverio Carrara, Bario Mascitti, and Anthony DiMatteo appeal their convictions, after a jury trial before Chief Judge Mishler in the Eastern District of New York, for operating illegal gambling businesses in violation of 18 U.S.C. § 1955.

The counts upon which the various defendants were convicted related to operations at different times and places. More specifically, twenty defendants were tried together on four counts of a seven-count indictment. Scafidi and Voulo were convicted on Count Two (the "967 East Second Street Count") of conducting an illegal gambling business from March 1972 to July 1972. Appellants Napoli, Sr., Napoli, Jr., DeLuca, Vigorito, Carrara, Mascitti, and DiMatteo were convicted on Count Four (the "Hiway Lounge Count") of conducting an illegal gambling business from April, 1973 to June, 1973. Count Three (the "Apartment 309 Count") was dismissed after trial because the jury did not find five people involved in that gambling business, as required by § 1955. Count Seven, the conspiracy count, was dismissed at the close of the Government's case because the indictment alleged a single conspiracy but the evidence showed at least two. Sentences for the defendants ranged from five years in prison and a $20,000 fine (Napoli, Sr.) to two months in prison and 34 months probation (Scafidi).

I.

The evidence at trial showed a large-scale numbers lot-

tery operating in Brooklyn during three discrete time periods: Spring, 1972 (the 967 East Second Street Count); Winter, 1972-73 (the Apartment 309 Count); and Spring, 1973 (the Hiway Lounge Count).

The 967 East Second Street Count: Scafidi and Voulo.

On May 1, 1972, FBI agents conducted a warrant-authorized search of a residence at the above address. They discovered Voulo and two others in the basement operating a policy "bank". They seized a great deal of betting paraphernalia, some of which contained Voulo's fingerprints.

Visual surveillance prior to the search had established that Voulo, Scafidi and others had been using the residence for more than one month. Apparently, Scafidi regularly picked up daily policy "ribbons" for delivery to the ring's "controllers" around the city.

Also, a warrant-authorized search of 405 Elder Lane in Brooklyn in June, 1971, had found Scafidi and Voulo standing at a table piled high with betting slips, adding machines and cash.

The Apartment 309 Count: DiMatteo, Mascitti, Scafidi, Voulo, and Rocco Riccardi (all charged, but count dismissed after guilty verdicts were rendered only against the first four).

The evidence on this count consisted primarily of tape recordings made pursuant to court-ordered electronic equipment (referred to herein as "bugs") placed at the apartment of a friend of Mascitti. The friend allowed Mascitti to use the apartment for a few hours each afternoon while she was ab-

sent. DiMatteo and Mascitti were shown to be "bank" workers who called Scafidi about gambling at least once each day. A court-ordered wire-tap of Scafidi's home phone showed that he operated a lottery "accounting office". Because one defendant, Riccardi, was acquitted on this count, the Government failed to show the involvement of five people in the operation, as necessary under § 1955. The count was thus dismissed.

Three court orders had authorized the bugs at Apartment 309: Orders 309-I, 309-II, and 309-III. 309-I was issued by Judge Orrin G. Judd on December 8, 1972, and authorized interceptions for 15 days. 309-II was issued by Judge Jack B. Weinstein on January 15, 1973, permitting interceptions for 15 days. 309-III was issued by Judge George Rosling on February 20, 1973, approving interceptions for 15 days at Apartment 309 and at Scafidi's residence in Queens. All the orders listed some of the defendants by name and included "others as yet unknown" as targets. The bugs at Apartment 309 were installed on the night of December 8, 1972, after the building superintendent gave the agents a key to gain entry. The agents re-entered the apartment once more during the surveillance to reposition one bug.

Because the Apartment 309 Count was ultimately dismissed, any investigatory errors of the policre relevant on appeal only to the extent that the evidence presented for this Count might have "spilled over" to affect other counts.

The Hiway Lounge Count: The Napolis, DeLuca, Vigorito, Carrara, Mascitti, and DiMatteo.

This was the principal count. Court-ordered bugs

revealed that the Lounge was the headquarters for a massive numbers game. James Napoli, Sr. was the leader, with Napoli, Jr., Carrara, and Vigorito working as "controllers". DeLuca worked as an "accountant", and Mascitti and DiMatteo were "bankers".

The bugs at the Lounge had been installed pursuant to three court orders: Orders Hiway-I, Hiway-II and Hiway-III. Hi-way-I was issued by Judge John R. Bartels on April 12, 1973, authorizing interceptions for 15 days excluding Sundays. The named targets were the Napolis, DiMatteo, DeLuca, Martin Cassella and Richard Bascetta. Hiway-II was issued by Judge Bartels on May 3, 1973, *i.e.*, three days after the end of Hiway-I, authorizing the bugs for 15 more days, excluding Sundays. The targets named were the Napolis, DeLuca, Voulo, several non-appellants, and "others as yet unknown". Hiway-III was issued on May 24, 1973, *i.e.*, three days after the end of Hiway-II. The tapes obtained by Hiway-III were not sealed until more than three months later. No evidence from Hiway-III was introduced at trial.

The listening devices used in the Lounge were placed by FBI agents on the night of April 12-13, 1973. They were originally placed with one at the bar and one in a back room. During the pendency of Hiway-I the agents re-entered the Lounge to move the bar bug into the back room. During the three-day "pause" between Hiway-I and Hiway-II, Judge Judd issued an order authorizing the agents to enter the Lounge on the night of May 2-3 to restore the batteries in the bugs. At some point during Hiway-II and Hiway-III the agents re-entered to restore the batteries once again.

II.

The appellants raise many points of alleged error and each adopts the points argued by the others.

Besides the question of standing, namely, the right to question the legality of the surreptitious entries by agents to place the electronic devices which recorded the appellants' conversations, appellants' arguments focus primarily no various claims that the warrants pursuant to which the agents acted were for numerous reasons illegal and violative of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 *et seq.*

At the close of the Government's case, the conspiracy count was dismissed as to all appellants because of the discrepancy between the single conspiracy alleged in the indictment and the evidence of multiple conspiracies shown at trial. The Court's dismissal of the conspiracy count gives rise to appellants' claim that reversible error resulted from the Court's refusal to grant a mistrial or to sever the trial as to the individual defendants. Their claim is that the spill-over effect of the evidence admitted pursuant to the conspiracy count was highly prejudicial and probably responsible for the respective convictions.

Whether appellants have standing to object to the surreptitious entries of Apartment 309 and the Hiway Lounge.

Appellants argue that the evidence derived from the bugs planted in Apartment 309 and the Hiway Lounge should be suppressed because of allegedly improper surrep-

titious entries made by the agents to place and recharge the bugging devices. The Government contends that none of the appellants has standing to question the entries into Apartment 309, and that only Napoli, Sr. has standing to object to the entries into the Lounge.

[1, 2] All of the appellants were in some way overheard on the bugs planted in Apartment 309 and/or the Lounge. Thus, they all claim that they have standing to object to any unauthorized entries because they are "aggrieved persons" within the meaning of 18 U.S.C. § 2510(11). But that statute simply confers standing to object to unauthorized electronic surveillance; it does not expressly encompass standing to object to allegedly unauthorized entries to place or recharge the bugs. Only one present at the seizure or with a recognized "interest", either possessory or proprietary, in the premises, can claim the required "expectation of privacy" needed to object to such illegal entries. *See Alderman* v. *United States,* 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed2d 176 (1969) (proprietor can object to any unauthorized wiretap; those overheard can object only to their voice being overheard; and *Brown* v. *United States,* 411 U.S. 223, 93 S.Ct. 1565, 36 L.Ed.2d 208 (1973) (those with no interest in storehouse cannot object to illegal search which uncovered stolen merchandise).

[3, 4] The elder Napoli was the manager of the Hiway Lounge, and as such can raise any issue of unauthorized entry. But none of the other appellants had any interest in the Lounge except for their presence there for a few hours each afternoon. Mascitti has an arguable claim to a proprietary interest in Apartment 309 because the true lessee, his friend,

lent him the apartment's key so that he could enter on his own. But the district court found that his possession of the key and use of the premises for such a limited purpose was not enough to give him standing.

[5, 6] Whatever the exact, technical interests, or lack thereof, which these appellants had in the premises entered by the agents, it seems artificial to say that a person overheard, whose conversation would not have been overheard but for the entry, has no standing to move to suppress the conversations on a claim that the entry was improper. In any event, whether standing is accorded in this appeal to only one or any number of the appellants will not affect our holding that the Orders and the agents' activities were entirely proper. Therefore, for purposes of this appeal, we need not decide whether or not standing exists for the defendants to raise the claim of allegedly illegal entry.

Whether a court order authorizing illegal entry for secret placement, repair and/or removal of bugs is required as a part of, or in addition to, the court order authorizing the use of bugs.

[7] Mascitti and his co-appellants claim that Title III of the Omnibus Crime Control Bill of 1968, 18 U.S.C. § 2510 *et seq.*, prohibits all surreptitious police entries to install, repair or remove court-authorized bugs. However, it is clear from the legislative history of the Bill as well as the language of the statute, that Congress intended to empower courts to permit such entries in proper cases and under proper procedures. *See United States* v. *Ford,* 414 F. Supp. 879, 883 (D.D.C. 1976), *aff'd,* 553 F.2d 146 (D.C. Cir. 1977); S. Rep. No. 1097, 90th Cong., 2d Sess. 67, 103 (1968).

There remains the question of whether the authority granted by Title III is properly implemented where the court which approves the use of bugs does not explicitly authorize, either in the authorization order or in a separate order, secret break-ins to place, repair and/or remove the bugs. The Government argues that permission to make secret entries is at least implied in the bug authorizations here. Appellants argue, however, that all evidence gathered must be suppressed unless the court specifically authorizes secret entries.

The courts appear to be split on this issue, particularly after the recent District of Columbia Court of Appeals decision wherein it was held that the legislative purpose of Title III requires a separate court order for entry, *United States* v. *Ford,* 553 F.2d 146 (D.C. Cir. 1977). *See United States* v. *Altese,* No. 75 Cr. 341 (E.D.N.Y., Oct. 14, 1976) (separate order *not* required); *United States* v. *Dalia,* 426 F. Supp. 862, 865-66 (D.N.J. 1977) (separate order *not* required); *United States* v. *Finazzo,* 429 F. Supp. 803, 806-8 (E.D. Mich. 1977) (separate order required). It must be noted that until the District of Columbia Circuit spoke on this issue, it was generally considered proper practice *not* to require a separate warrant for entry.

The orders in our case, after a recital of facts charging that various appellants "have committed and are committing offenses involving the conducting, financing, managing, supervising, directing or owning in whole or in part a gambling business" in violation of State and Federal law, authorized the agents to intercept oral communications of the appellants specified therin at the named premises. The

orders further provided that "this authorization to intercept oral communications shall be executed as soon as practicable after signing of this Order and shall be conducted in such a way as to minimize the interception of conversations not otherwise subject to interception . . ." App. at A238, A276.

There can be no doubt that the warrants were based upon adequate factual affidavits. The alleged defect in the warrant is not the underlying factual basis therefor, but its lack of specific "breaking-in" authorization and a statement of the manner in which such "breaking-in" was to be conducted.

[8, 9] But the most reasonable interpretation of the orders in this case, granting authorization to bug private premises, is that they implied approval for secret entry. Indeed, any order approving electronic surveillance of conversations to be overheard at a particular private place, must, to be effective, carry its own authority to make such reasonable entry as may be necessary to effect the "seizure" of the conversations.

As Chief Judge Mishler stated below in his Memorandum Decision dated October 14, 1976, "[I.t is this Court's position that once probable cause is shown to support the issuance of a court order authorizing electronic surveillance thereby sanctioning the serious intrusion caused by interception, there is implicit in the court's order, concomitant authorization for agents to covertly enter the premises and install the necessary equipment." App. at A133.

[10, 11] Once a judicial officer is convinced by the facts

presented to him that electronic surveillance will aid in the detection of crime, his authorization that it be used should then transfer to the appropriate police agency the decision as to the precise mechanical means whereby the order is to be carried out. If the instrumentality to be used is a "bug", the placing of such a bug must of necessity be in the hands of the persons so authorized. And such placing will have to be surreptitious, for no self-respecting police officer would openly seek permission from the person to be surveilled to install a "bug" to intercept his conversations.

[12, 13] It would be highly naive to impute to a district judge a belief that the device required to effect his bugging authorization did not require installation. But neither should judges be presumed to have such familiarity with the installation of such devices or the premises in which they are to be installed that a court should be required in its order to specify the method of entry, the appropriate location of the bug, and the steps to insure its proper functioning. Were this to be required, a judge, in consultation with law enforcement officers, might have to visit the premises to be entered and discuss the best (or least objectionable) method of entry and the areas for the installations. His order would then have to contain explicit directions as to how to proceed, with the risk that any deviation therefrom, created by unforeseen emergencies, would create a possibility of illegality. It would be most unseemly for the courts to invade the province of law enforcement agencies by assuming that their competence was greater than that of the agencies presumably skilled in their field. It is significant that the statute, generally so detailed in its supervisory requirements, makes no mention of any need for a separate entry order. That the

statute requires general supervision by the courts over the bugging operation does not even impliedly impose on them the practical enforcement steps.

[14] We, therefore, hold that when an order has been made upon adequate proof as to probable cause for the installation of a device in particular premises, a separate order authorizing entry for installation purposes is not required.

[15, 16] Nor do the subsequent entries for repair or battery recharging alter this result. These were not entries for any purpose other than that originally authorized. No greater incursion into the appellants' privacy occurred from the re-entries than resulted from the oroginal entries. Furthermore, there is no suggestion that in any of the entries the FBI agents seized or attempted to seize or inspect papers or other articles not embraced in the order. They adhered to the authorized single purpose of seizing conversations represented in the papers on which the orders were granted as being of a criminal nature.

Whether the Government violated various provisions of Title III.

[17] Mascitti contends that the affidavits underlying Order 309-I did not sufficiently demonstrate the need to bug the particular apartment. This claim is groundless. Physical surveillance of Apartment 309 had detailed the regular goings and comings of DiMatteo and Mascitti, and analysis of the apartment's trash had revealed betting slips and records.

[18] Napoli, Sr. presents a similar insufficiency conten-

tion regarding the affidavit for interceptions at the Hiway Lounge. But the affidavit presented information gleaned from the bug of Apartment 309 as well as information gotten from confidential informants with established records of credibility. Also, physical surveillance identified the comings and goings of the principal suspects. The 25-page affidavit of Special Agent Parsons reveals more than sufficient information to justify the issuance of the Hiway-I warrant. App. at A277-A302.

[19] DiMatteo argues that the affidavit underlying the bugs at Apartment 309 did not sufficiently demonstrate what other investigative procedures had been tried without success. *See* 18 U.S.C. § 2518(1)(c). But the affidavit adequately informs the judge of the "nature and progress of the investigation and of the difficulties inherent in the use of normal law enforcement methods", which is precisely what it has to do to satisfy the statute. *United States* v. *Hinton,* 543 F.2d 1002, 1011 (2d Cir. 1976), *cert. denied,* 429 U.S. 1066, 97 S. Ct. 796, 50 L. Ed. 2d 783 (1977); *United States* v. *Fury,* 554 F.2d 522, 530 (2d Cir. 1977).

Mascitti, DiMatteo and Vigorito argue that the "delays" in sealing the tapes of conversations after the expiration of their authorizing orders require suppression of the tapes.

[20-22] In *United States* v. *Fury, supra,* 554 F.2d at 532-33, we held that, where a single order was extended, the tapes did not have to be sealed until the end of the last extension. Where the intercept is of the same premises and involves substantially the same persons, an extension under these circumstances requires sealing only at the conclusion

of the whole surveillance. *United States* v. *Principie,* 531 F.2d 1132, 1142 n.14 (2d Cir. 1976), *cert. denied,* 430 U.S. 905, 97 S. Ct. 1173, 51 L. Ed. 2d 581 (1977). The foregoing applies to the short delays in sealing 309-I and 309-II as well as Hiway-I and Hiway-II, for once the later Orders are deemed extensions of the prior ones, the administrative delay in sealing—in only one instance more than seven days—is reasonable and fully understandable. Even if the later Orders are deemed separate events, the sealing delays are quite distinguishable from those in the case relied upon by the appellants, *United States* v. *Gigante,* 538 F.2d 502 (2d Cir. 1976), where the unexcused delay was for over eight months.

The only tapes that were not sealed during the pendency of a subsequent extension order were those made pursuant to Order 309-III. These tapes were sealed after a delay of seven days caused primarily by the preoccupation of Special Attorney Barlow with preparations for the upcoming trial. Testimony presented to the trial judge made clear that the delay was not the result of any intent to evade statutory sealing requirements or to gain any tactical advantage. We agree with the trial judge that the Government has presented a satisfactory explanation for this short delay, fully in accord with the requirements of 18 U.S.C. § 2518(8)(a). *United States* v. *Fury, supra,* 554 F.2d at 533.

[23] Vigorito argues that the Government continued the Hiway-I and -II bugs beyond their 15-day expiration dates. But the authorizations for the bugs expressly excluded counting Sundays, so that all of the overheard conversations were within the authorized time periods.

[24, 25] Mascitti contends that the Government's failure to timely file "progress reports" to the authorizing judges requires suppression of the tapes gotten from the bugs. In several instances involving the 309 Orders, progress reports were filed up to two weeks late or not at all; with the Hiway Orders, one report was filed two days late. While these reports should have been timely filed, the sanction for failure to do so is surely not automatic suppression of the tapes. The requirement of reports, designed to enable the district judge to evaluate the continuing need for surveillance, is in the first instance discretionary with the judge authorizing the bugs. *See United States* v. *Iannelli,* 477 F.2d 999, 1002 (3d Cir. 1973), *aff'd,* 420 U.S. 770, 95 S. Ct. 1284, 43 L. Ed. 2d 616 (1975). So, surely, are any sanctions for failure to file timely. *See* 18 U.S.C. § 2518(6). The judges here clearly did not abuse their discretion.

[26] Carrara argues that the Government's failure to name him in the Hiway-II order requires suppression of his conversations gathered by that order. This argument is entirely refuted by *United States* v. *Donovan,* 429 U.S. 413, 97 S. Ct. 658, 50 L. Ed. 2d 652 (1977). Napoli, Sr.'s similar claim is also refuted by *Donovan.*

[27] DiMatteo argues that the misidentification of him as "Pasquale Rosetti" in Order 309-I requires suppression. This argument is frivolous in light of the complete absence of evidence that the Government was not acting in good faith. And the argument of DiMatteo based on failure to serve a timely inventory notice is foreclosed by *United States* v. *Donovan, supra. See also United States* v. *Variano,* 550 F.2d 1330, 1335-36 (2d Cir. 1977).

Whether there was sufficient evidence to convict Scafidi and Carrara.

[28] Only Scafidi and Carrara question the sufficiency of the evidence against them.

Scafidi was observed regularly using 967 East Second Street. In fact, he arrived at the apartment once while the police were searching it. Prior to and subsequent to the use of the apartment, Scafidi had been involved with policy rings which used the same type of wagering records and the same runner identifications. Also, Scafidi's phone calls from his home, properly intercepted by wiretaps, convincingly proved his involvement with the venture.

Carrara was taped while in several incriminating conversations with Napoli, Sr. which strongly support the inference that Carrara was actively involved in the ring as one of its "controllers". The jury properly convicted him on this basis.

Whether Count Four of the indictment (the Hiway Lounge Count) was legally sufficient.

[29] Napoli, Sr. contends that the Hiway Lounge count of the indictment was fatally defective for not specifying the type of gambling business he was alleged to have conducted. This argument holds no merit. The indictment tracked § 1955 while specifying approximate dates and relevant New York statutes. This is sufficient under *United States* v. *Salazar,* 485 F.2d 1272, 1277 (2d Cir. 1973), *cert. denied,* 415 U.S. 985, 94 S. Ct. 1579, 39 L. Ed. 2d 882 (1974).

Whether appellants were prejudiced by "spill over" from their joint trial.

[30] Most of the appellants (Napoli, Jr., Mascitti, Vigorito, Voulo, DeLuca, and Carrara) argue that once the trial court dismissed the conspiracy count at the end of the Government's case, the remaining substantive counts should have been severed for separate trials. The settled rule is that such a severance is not required unless prejudice would otherwise result or unless the conspiracy count had not been alleged in good fiath. *United States* v. *Ong,* 541 F.2d 331, 337 (2d Cir. 1976), *cert. denied,* 429 U.S. 1075, 97 S. Ct. 814, 50 L. Ed. 2d 793 (1977). There is no evidence here of bad faith on the part of the Government, and the conspiracy count was not frivolous; it was dismissed only for variance. The trial court gave the jury a lengthy cautionary instruction to disregard the conspiracy evidence and to judge each defendant on his own words and deeds. The jury showed its understanding of the instruction by acquitting several defendants. Moreover, the defendants convicted were found guilty on strong evidence, greatly reducing any risk of prejudice from joinder.

We have carefully considered all of the numerous issues raised by the appellants and find them to be without merit. The convictions are affirmed.

GURFEIN, Circuit Judge, concurring:

The dissenting opinion of my respected brother, J. Joseph Smith, and the split in the circuits, *see United States* v. *Ford,* 553 F.2d 146 (D.C. Cir. 1977), and *compare United*

States v. *Agrusa,* 541 F.2d 690 (8th Cir. 1976), impels me to add some of my own reasons for concurring in the majority opinion. Congress has constructed a statutory scheme for meeting the problems raised in *Berger* v. *New York,* 388 U.S. 41, 87 S. Ct. 1873, 18 L. Ed. 2d 1040 (1967), and *Katz* v. *United States,* 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967), by enacting Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 *et seq.* The issue is narrow. When a federal agent obtains access by trespass to premises in which he has been ordered to install a device to intercept oral communications by a court order which faithfully follows Title III and which includes a finding of probable cause, has he nevertheless intercepted conversations in a lawless manner as if he had no court order at allfi Was there in fact "a neutral predetermination of the *scope* of [the] search"fi *Katz* v. *United States,* 389 U.S. at 358, 88 S. Ct. at 515. Or are entries to plant "bugs" themselves unconstitutional invasions of privacy *distinct from* the actual eavesdrop sanctioned in the orderfi An affirmative answer was "[e]ssential to [the] holding" in *United States*v. *Ford, supra,* 553 F.2d at 170, on *constitutional* g nds. I respectfully disagree.

Title III covers oral interceptions ("bugging") without prescribing any duties for the judicial branch on the method to be used in installing the "bug". These statutory requirements were carefully tailored to meet the constitutional requirements set out in *Berger* and *Katz. See United States* v. *Tortorello,* 480 F.2d 764, 771-75 (2d Cir.), *cert. denied,* 414 U.S. 866, 94 S. Ct. 63, 38 L. Ed. 2d 86 (1973). Congress knew that whether a "bug" was put in place by trespass or otherwise, the use of a "bug" to intercept conversations would re-

quire a warrant except when the "bug" is carried by a participant in a face-to-face conversation, *On Lee* v. *United States,* 343 U.S. 747, 72 S. Ct. 967, 96 L. Ed. 1070 (1952), or is used with the consent of a party. *See Katz, supra.* The warrant under Title III is limited to interception of oral conversations, 18 U.S.C. § 2518, and does not in any way permit the search and seizure of goods or papers on the premises. Indeed, if such goods or papers were subjected to search under the interception order, suppression would follow. There is an analogy to the opening of foreign mail by the Customs, which is not constitutionally offensive provided the letters themselves are not read. *See United States* v. *Ramsey,* 431 U.S. 606, 97 S. Ct. 1972, 52 L. Ed. 2d 617 (1977).

What the statute requires is not a specification by the judge of the method for placing the "bug" but simply "a particular description of the place where the communication is to be intercepted". Congress knew that an order such as is under review, that "electronic *surveillance* of the oral communications of the above-named subjects *shall occur* at the above described premises" (emphasis added), would require covert installation. If supporting proof were needed, it is supplied by the 1970 Amendment, Pub. L. No. 91-358, Title II, § 211(b), 84 Stat. 654 (amending 18 U.S.C. § 2518(4)), under which the order authorizing interception of an oral communication may direct a landlord or custodian, among others, to furnish the applicant with all facilities and technical assistance necessary to "accomplish the interception *unobtrusively"* (emphasis added). This provision is not for the protection of the subject of the interception order since it is to be incorporated only "upon request of the applicant". In sum, if the enforcement agent thinks that he can achieve

such cooperation on his own, he need not get a court order to execute his mission "unobtrusively" with the cooperation of the landlord or custodian.

With its attention having been called to the need for doing the job "unobtrusively" to the point of enlisting the aid of persons whose aid would amount to trespass, Congress failed to include in Title III a provision such as is found in the New York Criminal Procedure Law § 700.30(8) which requires that an eavesdropping warrant contain "[a]n express authorization to make secret entry upon a private place or premises to install an eavesdropping device if such entry is necessary to execute the warrant",—a provision added to the otherwise almost verbatim copying of 18 U.S.C. § 2518(4). The judge to whom an application is made may, of course, require more than the statute prescribes before he is willing to sign the order, but the requirement that he separately sanction each surreptitious entry is nowhere to be found in the statutory scheme. That can hardly be due to congressional oversight. It is implicit that ordinarily only a single entry need be made, save in the exigent circumstance of equipment malfunction, as was the case here. Because the statute does not require the judge to authorize the manner of entry, a contention that the judge is nevertheless required to do so must rest on a reading of the Fourth Amendment itself.

The Fourth Amendment in part reads: ". . . no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized".

The orders here do conform precisely to the requirements of the Fourth Amendment as well as those of § 2518. They particularly describe the *premises* to be "searched." They state that there is probable cause to believe that particular oral conversations of *named* persons and others concerning the *specified* offenses will be obtained through the interception at the *named* premises which, there is probable

cause to believe, are being used for commission of the *named* offenses. "Prompt" execution of the authorization is ordered, and the interception is limited not only in time but to occasions when at least one of the named subjects is present.

Since the right of the named persons to privacy has already been subjected to the "probable cause" test at the hands of an independent judicial officer and since the order is detailed enough to defeat any realistic claim that it is a "general warrant," I believe that the basic requirements of the Fourth Amendment have been met. I respectfully suggest that cases which have held trespass to be invalid in the absence of *any* warrant whatever are hardly dispositive. *But cf.* the discussion in *United States v. Ford, supra.* In *Berger* there was a surreptitious entry but the Supreme Court failed to note it as a *separate* constitutional problem. *See* 388 U.S. at 45, 53-64, 81-82, 96-97, 107-12, 87 S.Ct. at 433. We do have here "the procedure of antecedent justification . . . that is central to the Fourth Amendment." *See Osborn v. United States,* 385 U.S. 323, 330, 87 S.Ct. 429, 433, 17 L.Ed.2d 394 (1966).

Judge Smith notes that there may be a danger in surreptitious entry. That may be conceded, but the federal judge is hardly in as good a position to evaluate such risks as is the law enforcement agent. Common sense will suggest that, in the absence of a plausible ruse, the "bug" should be put in place when the premises are vacant. A mistake as to whether they are occupied, in fact, could hardly be corrected by a judicial order.

Now that attention has been called to this question in several circuits, it is hoped that Congress will provide the national consensus needed to reconcile the needs of law enforcement with the rights of privacy that belong to all persons until probable cause has been shown and the approval of an independent judge obtained. The finding of what the judge must do in these circumstances to keep the "search" reasonable is, I think, within the prerogatives of Congress. In the meantime, until the Supreme Court speaks, it might

be advisable for district judges to make a general direction for forcible or surreptitious entry a part of the interception order, not so much on constitutional grounds, *see United States* v. *Agrusa*, 541 F.2d 690, 696-98 (8th Cir. 1976),[1] as for the protection of the agents.

J. JOSEPH SMITH, Circuit Judge (dissenting):

I respectfully dissent. I would reverse for retrial as to all defendants, with all evidence obtained by electronic surveillance after warrantless surreptitious entries suppressed. The course followed by the agents here makes a mockery of the promise that the "dirty business" of electronic eavesdropping authorized by the Act of 1968, 18 U.S.C. § § 2510-2520 (1970), would be strictly supervised and controlled. Title III of the 1968 Crime Control Act was drafted with the *Berger* and *Katz* decisions as a guide, including the *Katz* requirement to "conduct the search within precise limits established by a specific court order . . . " 1968 U.S. Code Cong. & Admin. News, pp. 2162, 2163. It is not too much to ask that a magistrate pass upon the necessity for and the manner of surreptitious entries into private premises, either business or residential, in light of the obvious dangers of injury and death to occupants and officers in the course of such gross invasions of privacy. The dangers may vary greatly between such methods as the planting of a bug by a restaurant patron, and a forcible breaking and entry when the premises are assumed to be unoccupied. The Congress recognized the existence of such devices as the martini olive transmitter, the spike mike, the infinity transmitter and the microphone disguised as a wrist-watch, picture frame, cuff link, tie clip, fountain pen, stapler or cigarette

1. The Eighth Circuit said: [W]hile there are two aspects to the search and seizure which occurred here [interception of oral communications after forcible entry] as compared with one in *Osborn* and *Katz*, this difference is, for constitutional purposes, one of degree rather than kind." 541 F.2d at 698. In *Agrusa*, though the order permitted "forcible entry at any time of day or night", it was challenged unsuccessfully on Fourth Amendment grounds.

pack. 1968 U.S. Code Cong. & Admin. News, p. 2183. Electronic devices in some instances might be installed in a manner not requiring entry by the officers into the premises. See *United States* v. *Ford*, 180 U.S. App. D.C. 1, 6 n. 20, 553 F.2d 146, 151 n. 20 (1977); cf. the "spike mike" of *Silverman* v. *United States*, 365 U.S. 505, 81 S. Ct. 679, 5 L. Ed. 2d 734 (1961). Because of its dangers, "bugging" as distinguished from wiretapping, is relatively little used. See *United States* v. *Ford, supra*, 553 F.2d at 149, n. 12. The choice of methods should be made known to and passed on by the magistrate.

The lack of warrants for the entries is not the only defect in the procedures used here. The delays in sealing and lack of timely progress reports to the judges, as well as the unauthorized reentries indicate a wide disregard for the intent of the Congress that the use of this dangerous tool be strictly supervised. We have been willing to excuse an occasional slip-up on timing as my brothers have pointed out. The perhaps inevitable result has been a progressive weakening of the safeguards. I would agree with the District of Columbia Circuit in *Ford* and draw the line here.

(2) United States v. Milton, 555 F 2d 1198 (5 Cir. 1977)

United States Court of Appeals
Fifth Circuits

No. 75-4434

United States of America

Appellee

v.

Maxie Eldon Milton, Eugene L. Fowler, and Andrew Areaux,

Appellants

July 5, 1977

Defendants were convicted in the United States District Court for the Eastern District of Louisiana, Lansing L. Mitchell, J., of conducting an illegal gambling business and they appealed. The Court of Appeals, Goldberg, Circuit Judge, held that: (1) the evidence was sufficient to show that the bookmaking operation in which one defendant participated comprised five or more persons, and (2) the expert witness for the prosecution did not improperly testify with respect to ultimate facts in the case and thereby invade the province of the jury.

Affirmed.

1. Gaming ⇐98(1)

In prosecution for conducting illegal gambling business, evidence was sufficient to show that bookmaking operation in which defendant participated comprised five or more persons as required by statute 18 U.S.C.A. § 1955(b)(1)(ii).

2. Gaming ⇐98(1)

Evidence that two bookmakers occasionally exchanged line information does not itself warrant conclusion that one bookmaker is participant in other's operation for purposes of statute prohibiting conducting an illegal gambling business involving five or more persons, but rather, it must be shown additionally that receipt of line information by one bookmaker substantially affects other's business, or that there is constant exchange of line information between the two. 18 U.S.C.A. § 1955(b)(1)(ii).

3. Gaming ⇐98(1)

Isolated and casual lay off bets between bookmakers may not be sufficient to establish that one bookmaker is conducting or financing the business of a second within purview of statute prohibiting conducting illegal gambling business involving five or more persons. 18 U.S.C.A. § 1955(b)(1)(ii).

4. Gaming ⇐98(1)

Evidence of consistent pattern of lay off betting or exchanging line information between two bookmakers may establish essential link between them for purposes of statute prohibiting conducting illegal gambling business involving

five or more persons. 18 U.S.C.A. § 1955(b)(1)(ii).

5. Criminal Law ⇐1038.1(5)

In prosecution for conducting illegal gambling business involving five or more persons, trial court did not commit plain error in giving instruction on admissibility of conspirator's statements against coconspirators, particularly where charge made clear that each defendant had to be connected by virtue of his or her acts with gambling organization meeting requirements of statute. 18 U.S.C.A. § 1955(b)(1)(ii).

6. Criminal Law ⇐470

In prosecution for conducting illegal gambling business involving five or more persons, Government's expert witness did not invade province of jury by interpreting certain bets as lay off bets, by making inferences regarding each defendant's role in the organization, and by testifying that bookmaker who for commission passes wagers on to a central gambling operation becomes part of that operation. 18 U.S.C.A. § 1955.

7. Criminal Law ⇐469

Expert opinion evidence may be excluded if its prejudicial impact substantially outweighs its probative value, if it wastes time, or if trial court determines that expert's specialized knowledge will not assist trier of fact to understand evidence. Federal Rules of Evidence, rule 704, 28 U.S.C.A.

8. Criminal Law ⇐470

Although qualifying of witness as expert does not

render his every conclusion immune from challenge, mere fact that expert's conclusion trenches upon jury issue does not compel its exclusion. Federal Rules of Evidence, rule 704, 28 U.S.C.A.

9. Criminal Law ⇐469

Courts must remain vigilant against admission of legal conclusions and expert witness may not substitute for court in charging jury regarding applicable law. Federal Rules of Evidence, rule 704, 28 U.S.C.A.

Eugene L. Fowler, pro se.

Donice Alverson, New Orleans, La., court appointed for Fowler.

Maxie E. Milton, Lee R. Leonard, New Orleans, La., for Milton and Areaux.

Gerald J. Gallinghouse, U.S. Atty., Teresa Marie Black, U.S. Organized Crime Force, New Orleans, La., for plaintiff-appellee.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before GOLDBERG, SIMPSON and FAY, Circuit Judges.

GOLDBERG, Circuit Judge:

Maxie Milton, Eugene Fowler, and Andrew Areaux were among eleven persons charged in January 1973 with conducting an illegal gambling business in violation of 18 U.S.C. § 1955.[1] Of the ten defendants convicted after a jury trial, Milton, Fowler and Areaux have filed this appeal. Fowler contends chiefly that the government failed to show that the bookmaking operation in which he concededly participated comprised five or more persons as required by §

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1. 18 U.S.C. § 1955 provides in part as follows:

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section —

(1) "illegal gambling business" means a gambling business which —

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

Louisiana Revised Statutes, § 14:90, provides as follows:

Gambling is the intentional conducting or directly assisting in the conducting, as a business, of any game, contest, lottery, or contrivance whereby a person risks the loss of anything of value in order to realize a profit.

Whoever commits the crime of gambling shall be fined not more than five hundred dollars, or imprisoned for not more than six months, or both.

1955(b)(1)(ii). Milton and Areaux contend solely that expert witnesses for the prosecution "invaded the province of the jury" by testifying with respect to ultimate facts in the case. We find both contentions meritless and accordingly affirm.

THE BOOKMAKING OPERATION REVISITED

As we explained in *United States v. Box*, 530 F.2d 1258 (5th Cir. 1976), a successful bookmaker is not a gambler but a businessman. He makes his profits not from winning bets, but from collecting a certain percentage of the amount bet that the losing bettors must pay for the privilege of betting. This percentage, usually 10%, is called "juice" or "vigorish."[2] A bookmaker normally has a "line" or "point spread" on each game on which he is taking bets. The calculation is that an equal number of wagered dollars will be attracted to either side of the point spread. Thus, if the line in pro football is Washington by six over Dallas,[3] the bookmaker expects some bettors to wager as much on Dallas to win or to lose by six or fewer points as others will bet on Washington to prevail by more than six points. When this is true, the bookmaker is guaranteed a profit of exactly 10%. When it is

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2. Thus, one must risk $110 to win $100. Authorities for this discussion include not only previous opinions of this and other circuits, which provide excellent primers for the aspiring student of bookmaking, *see, e. g., United States v. McCoy*, 539 F.2d 1050, 1059-60 (5th Cir. 1976); *United States v. Box, supra*, 530 F.2d at 1261-62; *United States v. Joseph*, 519 F.2d 1068, 1070 n.2 (5th Cir. 1975), *cert. denied*, 424 U.S. 909, 96 S.Ct. 1103, 47 L.Ed.2d 312 (1976); *United States v. Thomas*, 508 F.2d 1200, 1202 n.2 (8th Cir.) *cert. denied*, 421 U.S. 947, 95 S.Ct. 1677, 44 L.Ed.2d 100 (1975), but also the testimony of experts in the case at bar.

3. A faint possibility indeed, the courageous exploits of Billy Kilmer notwithstanding.

not, he may win more than 10% or fail to clear 10%. When the bets placed with a bookmaker are unbalanced, the risk-averse entrepreneur will adopt one of two strategies. The bookmaker may adjust his line up or down until it reaches equilibrium. More likely he will seek to "lay off" a bet to another bookmaker or to a mere bettor. That is, the bookmaker will bet the more popular of the two teams in the amount (ideally) by which bets on that team exceed the sum bet on the disfavored team at a given point spread. If the popular team wins, he will thus pay out to his bettors more than he took in, but will offset this disbursement by his own lay off winnings. By this device the bookmaker seeks to balance his books and assure himself neither more nor less than a 10% profit.

If a bookmaker sets his line badly, he may find it difficult to lay off a sufficient number of bets to offset the risk of loss. Hence accurate "line information" regarding the expectations of his customers proves crucial.[4] Moreover, bookmakers in a relevant market will seek to set a common line. If a particular bookmaker gives the Cowboys 6 points when all others give the Cowboys 3 points, all rational Cowboys fans will bet with the bookie who was out of line, and the rational Redskin fan (possibly an oxymoron) with all others. A rational bettor, as opposed to a rational fan,

4. Indeed, sophisticated bookmakers (and we use the word sophisticated in its Runyonesque sense only) will often utilize techniques of market research that in more conventional businesses might be used to peddle a new mouthwash or detergent. Upon settling on a preliminary line, such a sophisticated bookie will call it a selected sample of bettors in an attempt to predict the market for particular point spreads. On the basis of test group results, the bookie will adjust the line, then place the modified "product" on the market.

however, will bet equal amounts on the Cowboys plus six *and* the Redskins minus three. At worst, this cynical but rational bettor will win one bet and lose the other, suffering a net loss of 10% of the losing bet; at best, he will win both wagers.

These hazards of the bookmaking business may be minimized, then, by lay off bets and frequent exchanges of line information among bookmakers. The difficult question in cases of this kind is typically whether lay off wagers and exchanges of line information among individuals or bookmaking operations suffices to create an illegal gambling operation comprising five or more persons.

THE JURISDICTIONAL FIVE

[1] For assessing appellant Fowler's claim that the bookmaking organization in which he participated lacked five members, we have our pick of seven conceded bookmaking operations from which potentially to fashion the critical mass of five individuals.

Appellant Fowler concedes that he was a clerk for James Kent's bookmaking operation, that Thais Nix was a runner for that operation, and that Joseph Mills was a commission bookmaker working for James Kent. Fowler denies that more than four people were involved in the enterprise. The jury disagreed.

Evidence at trial, including transcripts of conversations recorded by government wiretaps, indicated that James Kent's bookmaking operation exchanged lay off bets and line information with bookmaking organizations operated by Angelo (Uncle Lon) Nicotri, Victor Candiotto, Tony Martinez, Maxie (Fat Man) Milton, Andrew Areaux, and John (Rose) Kent. The jury's conclusion that the prosecu-

tion met its burden of establishing the jurisdictional five need only have rested on the premise that any of these bookmakers was part of James Kent's operation.

[2-4] Much of the government's evidence is, nevertheless, at best problematic and at worst insufficient to sustain the jury's conclusion, and we take this opportunity to reiterate why this should be so. Simply put, evidence that two bookmakers occasionally exchange line information does not itself warrant the conclusion that one bookmaker is a participant in the other's operation for purposes of § 1955. Rather, it must be shown additionally that the receipt of line information by one bookmaker substantially affects the other's business or that there is a constant exchange of line information between the two. *See United States v. McCoy,* 539 F.2d 1050, 1061-62 (5th Cir. 1976). Similarly, isolated and casual lay off bets between bookmakers may not be sufficient to establish that one bookmaker is conducting or financing the business of a second. *See id.* at 1061; *United States v. Thomas, supra,* 508 F.2d at 1206. Moreover, bets between bookmakers may be personal wagers that are not lay off bets. On the other hand, evidence of a consistent pattern of lay off betting or exchanging line information between two bookmakers may establish the essential link between them for purposes of § 1955.[5]

We need not explore these complexities in the case at bar; even without considering the pattern and frequency of

5. *See e. g., United States v. Guzek,* 527 F.2d 552 (8th Cir. 1975) (evidence as to certain appellants sufficient because they were bookmakers who exchanged line information on an almost daily basis); *United States v. Schaefer,* 510 F.2d 1307 (8th Cir.) *cert. denied,* 421 U.S. 978, 95 S.Ct. 1980, 44 L.Ed.2d 470 (1975) (bookmakers were systematically and continuously involved in single gambling business).

Appendix D
Opinions Relevant to Federal Question of Interpretation of 18 U.S.C. § 1955 as Decided in Various Circuits.

lay off betting and exchanging line information, the evidence showing Fowler's bookmaking organization to comprise the jurisdictional five excluded all reasonable contrary hypotheses. For example, evidence showed that appellant Andrew Areaux collected wagers from customers on behalf of James Kent's bookmaking organization and received commissions from James Kent for his efforts.[6] The evidence that Areaux was a commissioned bookmaker for James Kent may be broken down into four elements. First, the transcripts produced by the government's wiretap surveillance revealed that Areaux frequently called in bets to the Kent office, where Fowler received the calls. In at least some of these it is clear that Areaux was calling in bets made by others.[7] Second, the transcripts show that Fowler and Areaux discussed customers of the Kent organization. Fowler admonished Areaux to make sure that the customers continued to bet.[8]

Third, the record discloses that Fowler telephoned Areaux to apprise him of line changes made by the Kent organization. An efficient bookmaking organization must constantly alert its commissioned agents to line updates. The main organization is obligated to honor all bets collected by its agents at the point spread the sub-bookies announce to their customers. The agent is often out of contact with the main organization and the line he peddles may thus lag dangerously behind market fluctuations. Hence the line updates Fowler offered Areaux are significant. Finally, police seized from Areaux the latter's "catch up" records, revealing the

6. *See, e. g.* Vol. III, Trial Transcript at 91, 129-43, 197, 265-82, 342, 377-84.

7. See Vol III, Trial Transcript at 342.

base amounts on which he expected to earn a commission.[9]

In short, the evidence showed that James Kent's organization employed Areaux as a commissioned bookmaker. Areaux consistently passed on his customers' bets to Kent and expected in return a percentage of the profits. His efforts were not sporadic or casual, but rather evince a carefully planned and coordinated effort between Areaux and Kent's agent, Fowler.[10]

[5] We conclude that there was ample evidence to support Fowler's conviction for violating 18 U.S.C. § 1955.[11] The juice was spread and Fowler and Areaux were spliced into the quintant arc of conduction. The circuits were serpentine and heavily insulated, but the conduction points equalled or exceeded the quintet required by § 1955.

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8. For example, Areaux (A) and Fowler (G) discussed one customer who, though branded a "born loser," had apparently gotten the better of Kent of late:

A: OK. Think we can beat him later on?
G: I hope so.
A: I know you don't know nothing.
G: Naw, he's a sucker huh?
A: Yeah, he's a, he's a, he's a born loser. I been knowing him for a long time.

G: As long as he keeps bettin' now. You know.
A: Ya got a shot.
G: Ya got a shot.
A: Oh, he'll play.
G: If, if he, you know. Like he's got me beat almost a thousand dollars this week.
A: Yeah.
G: If he stops bettin' though it ain't no [expletive deleted] good.
A: No, he won't stop.
G: You know. You get that [expletive deleted] make that [expletive deleted] keep bettin you man.
Vol. III, Trial Transcript at 269-70.

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9. Bookmakers who hire other bookmakers to accept wagers on a commission basis typically offer 25% of the winnings on sports bets and 50% of the winnings on horseracing action. A "bankroll" is the amount by which a commissioned bookmaker's winnings exceed losses on a particular day, and hence the base amount on which the latter takes commission. "Catch up" is the term used by commissioned bookmakers to describe the situation in which losses exceed winnings, when no commission is due.

10. We thus need not comment on other ways of aggregating the jurisdictional five, including the candidacy for this select group of one Sidney (Lamb Chops) Militaire, whom Kent employed to provide service information at between $100 to $150 per week.

11. Appellant Fowler also objects to an instruction given the jury. Because he failed to object to that instruction at trial, he must, of course, demonstrate that the court's offering it was plain error. The instruction was as follows:

> If you find that five or more persons knowingly associate themselves together to carry out a common plan or arrangement, with the intent either to accomplish some unlawful purpose, or to accomplish some lawful purpose by unlawful means, there arises from the very act of knowingly associating themselves together with such intent, a kind of partnership in which each member becomes the agent of every other member so, where the evidence in the case shows such a common plan or arrangement beyond a reasonable doubt, evidence as to an act knowingly done or a statement knowingly made by one such person while the common plan or arrangement is continuing, and in furtherance of some object or purpose thereof, is admisisible against all.

Fowler contends that giving this instruction was plain error because it is a classic conspiracy instruction and the appellants were not on trial for conspiracy.

The instruction did not charge the jury to find a conspiracy violation. Strictly speaking, it deals only with the admissibility of evidence rather than with the basis for conviction. Even considering the instruction as a guide to the admissibility of evidence, however, it is worth noting that the theory underlying it has been applied in § 1955 cases. In *United States v. DiMuro*, 540 F.2d 503 (1st Cir. 1976), for example, appellant bookmakers had been connected to a centrally controlled gambling organization. Appellants argued that it was improper to admit against a defendant infor-

EXPERT TESTIMONY

[6] The sole issue raised by appellants Milton and Areaux is that the government's expert witnesses "invaded the province of the jury" by interpreting transcripts of conversations among the defendants. Specifically, Milton and Areaux object to the witnesses' interpretation of certain bets as lay off bets, to the experts' inferences regarding each defendant's role in Kent's organization, and to expert testimony that a bookmaker who for commission passes wagers on to a central gambling operation becomes part of that operation.

[7-9] We reject appellants' attack. Rule 704 of the Federal Rules of Evidence provides:

> Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

To be sure, Rule 704 does not paint with a broad brush, and expert opinion evidence may still be excluded if its prejudicial impact substantially outweighs its probative value, if it wastes time, *see* Rule 403, Fed.R.Evid., or if the trial court determines that the expert's specialized knowledge will not

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mation from branches of the organization with which that defendant was not directly concerned. The court disagreed, holding that it was proper to admit all such information against all appellants connected with the organization. *Id.* at 508 n. 5.

In any event, the appellants have not demonstrated that this instruction was prejudicial on the facts of this case. Without endorsing the use of this instruction in future § 1955 cases, it is clear to us that, on the facts of this case and taking the court's charge as a whole, its use in the case at bar did not amount to plain error. The charge elsewhere made clear that each defendant had to be connected by virtue of his or her own acts with a gambling organization meeting the requirements of § 1955.

assist the trier of fact to understand the evidence. *See* Rule 702, Fed.R.Evid. Although the qualifying of a witness as an expert does not render his every conclusion immune from challenge, *see United States v. Ragano,* 476 F.2d 410 (5th Cir. 1973), the mere fact that an expert's conclusion trenches upon a jury issue does not compel its exclusion. Wigmore aptly characterizes the basis usually assigned for the "ultimate issue" rule—that the witness may not usurp the province of the jury—as a "mere bit of empty rhetoric." VII Wigmore § 1920 (3d ed.).

Rule 704 abolishes the per se rule against testimony regarding ultimate issues of fact. By the same token, however, courts must remain vigilant against the admission of legal conclusions, and an expert witness may not substitute for the court in charging the jury regarding the applicable law. *See Huff v. United States,* 273 F.2d 56 (5th Cir. 1959).

The trial court in the case at bar did not err in allowing the government's experts to characterize certain wagers as lay off bets or to interpret the transcripts with respect to appellants' respective roles in James Kent's gambling organization.[12] This court recently observed in a § 1955 case presenting a similar issue:

> Although we have, on occasion, frowned upon the

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12. Ironically, a survey of the trial transcript reveals at least twelve instances in which defense attorneys clearly sought to elicit on cross-examination precisely the kind of conclusions about which appellants now complain. See Vol. I at 326, 377, 332, 500; Vol. II at 112, 194, 215, 225, 227, 229; Vol. III at 56, 190. This appears to have been ignored by appellants' counsel on appeal, who cites as an example of the abuse of expert testimony a conclusion that defense counsel elicited on cross-examination. See Brief for Appellants Milton and Areaux at 13, quoting Vol. III, Trial Transcript at 108.

practice of asking an expert to give his conclusions as to the entire case *(see United States v. Ragano,* 5 Cir. 1973, 476 F.2d 410, 416-17) admissibility of an expert's conclusion depends on the nature of the issue and the circumstances of the case, and involves a large element of judicial discretion. *Hamilton v. United States,* 5 Cir. 1934, 73 F.2d 357, 358-59.

Here, in characterizing certain transactions as layoffs, the expert was correctly drawing "inferences from the facts which a jury would not be competent to draw." McCormick, Evidence § 13 (1954). It is questionable that these conclusions concerned an "ultimate issue." Even if they did, that does not require their exclusion. *Hamilton, supra.* The testimony challenged here is not unlike that referred to in upholding § 1955 convictions in *United States v. Bohn,* 8 Cir. 1975, 508 F.2d 1145, 1149-50, *cert. denied,* 421 U.S. 947, 95 S.Ct. 1676, 44 L.Ed.2d 100. *See also* Fed.Rule Evid. 704.

United States v. McCoy, supra, 539 F.2d at 1063.

A third aspect of the expert testimony objected to by appellants raises a more colorable claim. The court allowed a government witness who was interpreting the transcripts to enumerate certain activities that ostensibly established the actor as "a part of the gambling business." The witness's statement in context is as follows:

> There's a statement almost halfway through the page where Mr. Rose says: "A friend of mine gave me Florida plus And then further on: "I'll hold a couple of dollars on that myself." An individual who accepts wagers either from a friend, usually a bookmaker's immediate customers, or, of course, his friends, but a person who accepts wagers from other individuals, whether they be friends or associates, he passes them all on to a gambling business; if he does this for profit in the case of an agent or a sub-book or as a commissioned book that makes him part of that business.

Vol. III, Trial Transcript at 372-73. Appellants urge that this statement should have been excluded as a legal conclusion.

The conclusion that one who passes on bets for a percentage of profits is a part of the central gambler's business may, if taken out of context, seem more like a legal than a factual conclusion. In the context in which this statement appears, however, and under the circumstances of this complex case, we cannot say that the district court erred in allowing it. The government's witness was interpreting an otherwise obscure transcript and drawing upon his experience in the field to give some content to the role of the commissioned bookmaker. There is no contention that, insofar as the agent stated the law, he stated it incorrectly.[13] In any event, the statement is more amenable to interpretation as an empirical observation that a commissioned bookmaker is characteristically part of a central bookmaking operation. The statement was not likely taken as promoting a legal doctrine that for purposes of § 1955 one who passes on bets for profit necessarily conducts the central gambling business. Indeed, the witness mentioned neither § 1955 nor any of its operative terms.

Finally, the trial court's admonitions to the jury to accord no unusual deference to expert testimony and to take the court's instructions as the sole source of applicable law,

13. The touchstone for determining whether an accused "conducts an illegal gambling business" for purposes of § 1955 is whether that person "performs a necessary function other than as a mere customer or bettor in the operation of illegal gambling." *United States v. Joseph, supra,* 519 F.2d at 1071, *citing United States v. Jones,* 491 F.2d 1382, 1384 (9th Cir. 1974).

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and its careful instructions regarding the necessary factual conditions for finding that a person "conducted" a gambling business for purposes of § 1955 helped protect against the jury's misconstruing this statement.

The provinces of judge, jury and expert witness are not cartographically immutable and precise. Courts must accommodate to the expertise that the jury must receive from those who possess it, lest the jury flounder in confusion begotten by the arcane. The trial judge must have discretion to discern the needs presented by a particular case and the forms of expert testimony that may best guide the jury over unfamiliar terrain.

In this case the jury's task was to parse the argot of gambling. A predilection for gambling may be a constant in societal arrangements, but its modes have changed and not every person is acquainted with its permutations and variations.

The odds were that both judge and jury needed some expert guidance in penetrating the lines, finding the lay offs and putting all the odds together to decide whether the composite was gambling within the ambit of § 1955. The court was obligated to see the bookmaker's lexicon made intelligible to those unlearned in the argot if not the art. The jurors had to understand the gambler's lyric before they could sing the fateful quintain.

The judgment of the district court is AFFIRMED.

(3) United States v. Becker, 461 F.2d 230 (2 Cir. 1972)

United States Court of Appeals

Second Circuit

Nos. 636, Docket 72-1105

United States of America,

Appellee

v.

Richard Becker and Jack Eisen,

Appellant

Argued May 2, 1972
Decided May 30, 1972

Defendants were convicted of conducting an illegal gambling business and of conspiracy to do so, and from the judgment of the United States District Court for the Southern District of New York, Edward Weinfeld, J., the defendants appealed. The Court of Appeals, Mansfield, Circuit Judge, held, interalia, that under statute making it a federal crime to "conduct" certain types of gambling businesses Congress' intent was to include all those who participate in the operation of a gambling business, regardless of how minor their roles and whether or not they be labeled agents, runners, independent contractors or the like, and to exclude only customers of the business even though term "conduct" was not defined in the statute, in view of legislative history of another simultaneously enacted section of the Organized

Crime Control Act of 1970, and that the statute making it a federal crime to conduct certain types of gambling businesses is not unconstitutional for failure to require proof of a specific effect on interstate commerce.

Affirmed.

1. Gaming ⇐**79(1,2)**

Under statute making it a federal crime to "conduct" certain types of gambling businesses, Congress' intent was to include all those who participate in the operation of a gambling business, regardless of how minor their roles and whether or not they be labeled agents, runners, independent contractors or the like, and to exclude only customers of the business even though term "conduct" was not defined in the statute, in view of legislative history of another simultaneously enacted section of the Organized Crime Control Act of 1970. 18 U.S.C.A. §§ 1511, 1955(b) (1).

See publication Words and Phrases for other judicial constructions and definitions.

2. Statutes ⇐**223.2(8)**

Since the statute making it a federal crime to conduct certain types of gambling businesses and statute prohibiting conspiracy to obstruct enforcement of criminal laws of state with intent to facilitate illegal gambling business were enacted together within the Organized Crime Control Act of 1970, they should be construed in pari materia. 18 U..C. A. §§ 1511, 1955.

3. Commerce ⇐**82**

The statute making it a federal crime to conduct certain types of gambling businesses is not unconstitutional for failure to require proof of specific effect on interstate commerce flowing from the gambling prohibited since the prohibited activities affect commerce between the states and justify exercise of federal power under the commerce clause. 18 U.S.C.A. § 1955; U.S.C.A. Const. art. 1, § 8, cl. 3.

4. Conspiracy ⇐**28**

Because substantive offense of conducting a gambling business required participation of five or more persons, conspiracy count based upon the same illegal conduct was not improper under doctrine that "where concert is necessary to an offense, conspiracy does not lie," where an additional two persons, or seven in all, were named in indictment as having engaged in the conspiracy, whereas substantive offense required participation of only five. 18 U.S.C.A. §§ 371, 1955.

5. Conspiracy ⇐**28**

The commission of substantive offense and a conspiracy to commit it are separate and distinct offenses.

6. Conspiracy ⇐**43(6)**

As long as conspiratorial concert of action and substantive offense underlying it are not coterminous and fewer participants are required for commission of the substantive offense than are named as joining in a conspiracy to commit it, there is no infirmity in the conspiracy indictment.

7. Criminal Law ⇐**1169(1)**

Convictions of conducting illegal gambling business would not be reversed on ground that certain incriminating telephonic interceptions introduced by the government which had been obtained as result of eavesdropping orders issued by district court pursuant to Omnibus Crime Control and Safe Streets Act should be suppressed because of

government's failure to comply with provisions of the Act specifying the procedure in that signature purporting to be that of Assistant Attorney General was not in fact his signature, where the government obtained the personal authorization of Attorney General even though application erroneously stated to court that it had been authorized by deputy rather than by the Attorney General himself. 18 U.S.C.A. §§ 2516(1), 2518(1) (a), (4) (d).

8. Criminal Law ⇐1166(1)

In prosecution for conducting an illegal gambling business, alleged error in that application to court for wiretap order erroneously stated that it had been authorized by Deputy Attorney General rather than by Attorney General himself was harmless, especially where resultant interception did not yield any evidence used against defendants at trial. 18 U.S.C.A. §§ 371, 1955, 2516(1), 2518(1)(a), (4) (d).

9. Criminal Law ⇐1166(1)

In prosecution for conducting an illegal gambling business, although procedure used by Attorney General and his staff in authorizing application to be made for wiretap order did not follow literal reading of the statute, the Attorney General's delegation of authority to the Executive Assistant to the Attorney General rather than to an Assistant Attorney General did not warrant reversal of conviction obtained through use of wiretaps resulting from the court order thereby obtained. 18 U.S.C.A. §§ 371, 1955, 2516(1), 2518(1) (a), (4) (d).

Herald Price Fahringer, Buffalo, N.Y. (Lipsitz, Green, Fahringer, Roll, Schuller & James, Buffalo, N.Y., of

counsel), for appellants.

Patrick F. Broderick, Sp. Atty., U.S. Dept. of Justice (Whitney North Seymour, Jr., U.S. Atty., S.D. N.Y., John W. Nields, Jr., Asst. U.S. Atty., David J. Ritchie, Patrick Philbin, Sp. Attys., U. S. Dept. of Justice, of counsel), for appellee.

Before KAUFMAN, MANSFIELD and TIMBERS, Circuit Judges.

MANSFIELD, Circuit Judge:

On June 30, 1971, seven persons were charged in a two-count indictment with conducting an illegal gambling business in violation of 18 U.S.C. § 1955, which had been enacted as part of the Organized Crime Control Act of 1970, and conspiracy to do so, 18 U.S.C. § 371. Five defendants pleaded guilty to the conspiracy count.[1] The remaining two, Richard Becker and Jack Eisen, appellants herein, were on January 14, 1972, adjudged guilty of both counts after a jury trial before Judge Weinfeld in the United States District Court for the Southern District of New York. Each was sentenced to two years imprisonment (of which 18 months was suspended, subject to the standing probation order of the court) and to pay a fine of $5,000. We affirm the judgments of conviction.

Title 18 U.S.C. § 1955 makes it a federal crime to conduct certain types of gambling businesses. To fall within the ambit of the statute, the gambling business must be one which

"(i) is a violation of the law of a State or political subdivision in which it is conducted;

1. The substantive charges against them were dismissed with the Government's consent.

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and
(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day."

18 U.S.C. § 1955(b) (1).

[1] Appellants concede for purposes of this appeal that they were operating a bookmaking business. Thus the proof satisfied parts (i) and (iii) of the definition. They contend, however, that the Government failed to meet the requirement of subsection (b) (1) (ii) of the statute that there be at least five persons who "conduct" the illegal gambling business,[2] since at least four of their co-conspirators were mere "runners" or "agents" of the business. We disagree. Admittedly the limits of the term "conduct," which embraces participation in the operation of an enterprise, are not defined in § 1955 itself. However, the legislative history of another, simultaneously-enacted section of the Organized Crime Control Act of 1970, 18 U.S.C. § 1511, sheds light on the intended meaning of the term. Section 1511, which prohibits conspiracy to obstruct the enforcement of the criminal laws of a state or one of its political subdivisions with the intent to facilitate an "illegal gambling business," defines the latter term in identical word-for-word terms as § 1955. With respect to the definition the authors of the bill stated

"The term 'conducts' refers both to high level bosses

2. The Government makes no contention that any of these runners "finance, manage, supervise, direct, or own all or part of [the gambling] business." 18 U.S.C. § 1955(b) (1) (ii).

and street level employees. It does not include the player in an illegal game of chance, nor the person who participates in an illegal gambling activity by placing a bet." H.R.Rep. No. 91-1549, 91st Cong., 2d Sess. (1970), 1970 U.S.Code Cong. & Admin.News p. 4029.

Thus Congress' intent was to include all those who participate in the *operation* of a gambling business, regardless how minor their roles and whether or not they be labelled agents, runners, independent contractors or the like, and to exclude only customers of the business.

[2] Since §§ 1511 and 1955 were enacted together as Parts B and C (§§ 802-803) of Title VIII of the Organized Crime Control Act of 1970, P.L. 91-452, 84 Stat. 936-37 (1970), they should be construed *in pari materia*. The foregoing legislative history of the word "conduct" as used in § 1511 is therefore of compelling persuasiveness in defining the meaning of the same term as used in § 1955. See 2 Sutherland, Statutory Construction § 5202 (1943). In view of the broad construction of "conduct" by Congress, we find no difficulty in concluding that "runners" or "agents" of a bookmaker fall within this category and that the requirement that the business be conducted by a minimum of five (5) persons has been satisfied.

[3] Appellants next argue that § 1955 is unconstitutional because it does not require proof of a specific effect on interstate commerce flowing from the gambling prohibited. This argument is foreclosed by the Supreme Court's recent opinion in Perez v. United States, 402 U.S. 146, 91 S.Ct. 1357, 28 L.Ed.2d 686 (1971), which upheld the constitutionality of a federal statute prohibiting loan sharking, 18 U.S.C. § 891 et seq., against a similar challenge, after concluding on the basis

of Congressional findings that the prohibitied activities affected commerce between the states and justified exercise of federal power under the Commerce Clause. Justice Douglas, speaking for the Court, noted that

> "loan sharking in its national setting is one way organized interstate crime holds its guns to the heads of the poor and the rich alike and syphons funds from numerous localities to finance its national operations." 402 U.S. at 157, 91 S.Ct. at 1363

The statement applies with equal force to illegal gambling of the class prohibited by § 1955. Indeed the President's Commission on Law Enforcement and Administration of Justice has concluded that "gambling is the greatest source of revenue for organized crime." Operating through a system of "layoff" bets "accomplished through a network of local, regional, and national layoff men" throughout the nation, the profit flowing into criminal coffers from gambling activities, the Commission concluded, may approximate $6 to $7 billion each year. President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 188-89 (1967); *Id.*, Task Force Report: Organized Crime 2-3 (1967). In considering the gambling provisions of the Organized Crime Control Act, members of Congress relied upon these findings and figures. See 116 Cong.Rec. 590-91, 603 (1970)[3] (Remarks of Senators McClellan and Allott). Senator McClellan in particular was

3. See also 116 Cong. Rec. 604 (1970) (Remarks of Senator Allott):

> "In addition to being largely the creature of organized crime and its principal source of revenue, illegal gambling both involves and affects interstate commerce. People, information, funds and paraphernalia, without which gambling enterprises could not be conducted, move regularly across State lines. Moreover, by diverting expenditures from ordinary lines of commerce into its own coffer, gambling distorts the production of goods for commerce and the flow of goods in interstate commerce. These interstate aspects of gambling make it an appropriate subject of concern to the Federal Government.
>
> "There are numerous cases in the Federal courts that demonstrate the dependency of substantial gambling enterprises on the facilities of interstate commerce.
>
> "Moreover, information available to the Government has disclosed that a system of couriers has been used to deliver funds which have been 'skimmed' from Las Vegas casinos to points throughout the country. Profits from gambling are not only transported in interstate commerce but are also being funneled out of the country as well. Government agents are attempting to breach the wall of silence thrown up by foreign bankers to cover the millions of dollars of untaxed underworld money which is allegedly flowing to numbered accounts in banks in Switzerland."

concerned about the magnitude of the profits made by bookmakers, which he had discovered during the course of Congressional hearings on gambling. 116 Cong.Rec. 590 (1970).

We therefore conclude that Congress acted well within the bounds of the Commerce Clause in enacting § 1955. The statute reaches only "a class of activities . . . properly regulated by Congress without proof that the particular intrastate activity against which a sanction was laid down had an effect on commerce." *Perez, supra,* at 152, 91 S. Ct. at 1361.[4] See United States v. Ruisi, 460 F.2d 153 (2d Cir. 1972). All courts thus far passing upon the constitutionality of § 1955 have reached the same conclusion.[5]

4. Although in light of our finding that § 1955 is constitutional it becomes unnecessary for us to consider the magnitude of the particular activity here charged, *Perez, supra* at 154, 91 S.Ct. 1357 it appears from the testimony below that this was no penny ante operation. From records of the bookmaking business seized by federal agents, the Government's expert was able to conclude, without contradiction by the defense, that appellants' operation grossed approximately $100,000 per weekday and $150,000 on weekends and employed at least 30 "runners" to collect bets and make payoffs.

5. See Schneider v. United States, 459 F.2d 540 (8th Cir. 1972) and cases there collected at n.2; United States v. Iannelli, 339 F.Supp. 171, 180 (W.D.Pa. 1972).

[4-6] Appellants next argue that because the alleged substantive offense required the participation of five or more persons, a conspiracy count based upon the same illegal conduct was improper, under the doctrine that "Where concert is necessary to an offense, conspiracy does not lie." United States v. Sager, 49 F.2d 725, 727 (2d Cir. 1947). United States v. Zeuli, 137 F.2d 845, 846 (2d Cir. 1943). The answer is that in this case an additional two persons, or seven in all, were named in the indictment as having engaged in the conspiracy, whereas the substantive offense required the participation of only five. It is a fundamental principle, too settled to require explication, that "the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses." Callanan v. United States, 364 U.S. 587, 593, 81 S.Ct. 321, 325, 5 L.Ed.2d 312 (1961). As we have recently reiterated, as long as the conspiratorial concert of action and the substantive offense underlying it are not coterminous and fewer participants are required for the commission of the substantive offense than are named as joining in a conspiracy to commit it, there is no infirmity in the conspiracy indictment. United States v. Benter, 457 F.2d 1174, 1178 (2d Cir. 1972). Appellants do not suggest that the evidence was insufficient to support a verdict finding them guilty of participation in a seven-man conspiracy. Indeed all seven defendants stand convicted of the conspiracy charge. Upon the record before us, therefore, appellants' conviction of the conspiracy charge appears to be valid and must be affirmed.

Appellants next urge, for the first time on this appeal, that their convictions should be reversed on the ground that certain incriminating telephonic interceptions introduced by the Government against them at trial, which had been obtained as the result of two eaves-dropping orders issued by

the district court pursuant to the Omnibus Crime Control and Safe Streets Act ("the Act"), should be suppressed because of the Government's failure to comply with provisions of the Act specifying the procedure to be followed in authorizing an application to a court of competent jurisdiction for such orders. One provision is 18 U.S.C. § 2516(1), which provides in pertinent part that "The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, ..." The other relevant sections are §§ 2518(1)(a) and 2518(4)(d), which require that the application to the court and the court order name the officer authorizing the application.

After appellants' counsel learned for the first time during the pendency of their appeal of certain disclosures made by the Government with respect to procedures followed by it in seeking interception orders in other cases, notably United States v. Robinson, 40 U.S.L.W. 2454 (5th Cir. 1972); United States v. Baldassari, et al., 338 F.Supp. 904 (M.D. Pa.1972); and United States v. Cihal, 336 F.Supp. 261 (W.D.Pa.1972), appellants suggested to us that letters authorizing applications to the district court for two interception orders in this case, one dated May 4, 1971 and the other May 12, 1971, which bore the purported signature of Assistant Attorney General Will Wilson, had not in fact been signed by him but had been signed by a deputy who affixed Wilson's name to the letters.

With respect to the May 4, 1971 wire-tap order, it is undisputed that the application for the order was personally

authorized by the then Attorney General of the United States, John N. Mitchell. On May 3, 1971, he initialed a memorandum to Will Wilson, Assistant Attorney General, specially designating Mr. Wilson pursuant to § 2516 to authorize Milton J. Carp, Attorney in Charge of the Organized Crime and Racketeering Section of the Department of Justice, to apply to the district court for an order permitting the interception of wire communications on two Yonkers telephones. Thereupon Henry E. Petersen, Deputy Assistant Attorney General Will Wilson. Thereupon Harold P. Shapiro, Deputy Assistant Attorney General in Charge of the Criminal Division, acting with Wilson's prior authority, signed Wilson's name to a letter authorizing Carp to apply to the court.

[7, 8] We are satisfied that the Government, by thus obtaining the personal authorization of Attorney General Mitchell, complied with the requirements of the Act in seeking the May 4, 1971 order. Although the application to the court erroneously stated that it had been authorized by Wilson rather than by the Attorney General himself, we consider this to be harmless error. United States v. Consiglio, 342 F.Supp. 556 (Crim.No. H-24) (D.Conn. filed April 20, 1972). In any event the resultant interception did not yield any evidence used against appellants at trial.

[9] Turning to the May 12, 1971, wiretap order authorizing the interception of wire communications on two Hartsdale telephone numbers, which were received in evidence against appellants, the facts as related in affidavits of officials of the Department of Justice appear to be identical with those recently furnished to another panel of this court in United States v. Pisacano, 459 F.2d 259 (2d Cir. 1972),

petition for cert. filed April 28, 1972, 40 U.S.L.W. 3528. According to the affidavit of Sol Lindenbaum, Executive Assistant to Attorney General Mitchell, neither the Attorney General nor an Assistant Attorney General had personal knowledge of the proposed application for the order or personally signed an authorization to apply to the court for it. Mr. Lindenbaum, in accordance with prior instructions from the Attorney General to review all requests for such authorization, reviewed a recommendation that the application be made and because the Attorney General was unavailable he affixed Mitchell's initials to a memorandum of authorization to Assistant Attorney General in the Criminal Division, signed Wilson's name to a letter authorizing Carp to apply to the court.

Upon the foregoing facts the panel in *Pisacano* concluded that although the procedure used by the Attorney General and his staff in authorizing the application to be made for one wiretap order (dated July 30, 1970) did not follow the literal reading of § 2516(1), *supra*, the Attorney General's delegation of authority to Mr. Lindenbaum rather than to an Assistant Attorney General would not warrant reversal of a conviction obtained through use of wiretaps resulting from the court order thereby obtained. We feel bound to follow *Pisacano*, especially since it is so recent and the facts before the court there are indistinguishable.[6] See, e. g., Tellier v. Commissioner of Internal Revenue, 342 F.2d 690, 692 n. 3 (2d Cir. 1965), affd., 383 U.S. 687, 86 S.Ct. 1118, 16 L.Ed.2d 185 (1966); Mallory v. United States, 104 U.S.App.D.C. 71, 259 F.2d 801, 802 (1958); see generally A. Alexander, En Banc Hearings in the Federal Courts of Appeal: Accommodating Institutional Responsibilities, 40 N.Y.U.L.Rev. 562, 582 n. 120 (1965). Our adherence to the law of the circuit, as thus established, is not to be construed

as an approval of the procedure followed by the Attorney General and his staff and we trust that henceforth all applications to the court pursuant to §§ 2516 and 2518 will be specifically authorized personally by the Attorney General or by an Assistant Attorney General specifically designated by him for the purpose.

We have considered the other points raised by appellants and find them to be without merit.

The judgments of conviction are affirmed.

Respectfully submitted,
ALL APPELLANTS

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